UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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J.G. KERN ENTERPRISES, INC.,

Respondent,

and

CASE 07-CA-231802
07-CA-245744
07-CA-252759

LOCAL 228, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Charging Party.

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CHARGING PARTY'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND SUPPORTING BRIEF

Stuart Shoup
Associate General Counsel
International Union, UAW
8000 E. Jefferson Ave.
Detroit, MI 48214
(313) 926-5216 (office)
(734) 775-6732 (cell)
sshoup@uaw.net

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), 29 C.F.R. § 102.46, Respondent J.G. Kern Enterprises, Inc. ("Respondent") filed exceptions and a supporting brief to the October 6, 2020 Decision and Order ("Decision") of Administrative Law Judge Paul Bogas ("ALJ"). The Charging Party International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its affiliated Local Union No. 228 ("Charging Party") now files its answering brief to the Respondent's exceptions and brief. For the reasons discussed below, the Charging Party respectfully requests that the Board adopt the ALJ's Decision, and uphold his finding that the Respondent violated Section 8(a)(5) and (1) of the Act by (1) failing and refusing to meet at reasonable times and confer in good faith from October 15, 2018, to January 9, 2019; (2) since April 10, 2019, stating that it would not consider any proposal for a union-administered benefits plan; (3) since April 17 and July 9, 2019, refusing to provide requested cost information regarding the existing benefit plans for bargaining unit employees; and (4) withdrawing recognition from the Charging Party as the exclusive collective bargaining representative of the bargaining unit employees.

II. STATEMENT OF THE CASE

After certification, the Respondent schedules, then cancels, bargaining dates several times, resulting in a three-month delay in the commencement of bargaining.

On October 3, 2018, the Charging Party was certified as the collective bargaining representative, pursuant to an NLRB election. GC ex. 2; Tr. 13:17-14:20 (Torrente). Paul Torrente ("Torrente"), then president of UAW Local 228, took the lead in attempting to schedule

negotiations, and reached out to the Respondent on October 8, 2018. Tr. 15:15-20 (Torrente). While he did not receive a direct response from the Respondent, he soon received a response from the Respondent's attorney, Jonathan Sutton ("Sutton"). Tr. 16:2-5 (Torrente). International Servicing Representative, Diane Virelli ("Virelli") also reached out to Sutton multiple times in October 2019 via certified mail. Tr. 43:14-21 (Virelli). Those letters were returned undelivered. Tr. 43:14-21 (Virelli).

Torrente and Sutton then had multiple conversations, over email and phone calls, regarding scheduling bargaining sessions and other concerns within the facility. Tr. 16:10-19 (Torrente). On October 17, 2018, via email, Sutton offered November 5-7 or November 26-28 as proposed dates for initial bargaining sessions. GC ex. 3. The next day Torrente responded that the Charging Party was ready and willing to meet during both of those proposed times. Id.

Having not heard anything from Sutton after accepting those bargaining dates, Torrente reached out to confirm on November 2, 2018. Id. Virelli, having her letters to Sutton returned, also reached out to Sutton via e-mail on the 2nd, made an information request, and again, requested bargaining. GC ex. 12.[1] Sutton did not reply until November 5, the day the parties were scheduled to meet, and cancelled the bargaining meeting because he was "stuck on Guam." GC ex. 4. Sutton added that he was also not going to be able to meet later in the month because he, "just sold my house in Houston, and have to pack a 6,700 ft house in very short order." Id. At the end of the e-mail, Sutton offered to "ask someone else to step in and fill my spot, in an effort to get things started." Id. The same day, Torrente responded stating, "we need to get the ball

[1] Virelli also followed this email with another certified letter which was also returned. Tr. 45:23-46:5 (Virelli).

rolling," "we cannot wait any longer," and accepted Sutton's offer to provide a substitute: "I look forward to hearing from someone, whoever that may be."[2] Id.

Shortly thereafter, Torrente was contacted by James Teague ("Teague") who indicated that he was replacing Sutton as the representative for the Respondent for a short period of time. Tr. 21:2-14 (Torrente). They communicated over telephone and text and agreed to meet on the previously agreed to dates of November 26-27. Tr. 21:18-22 (Torrente).[3] On the day the parties agreed to meet, Teague cancelled via text message. Tr. 21:21-25 (Torrente). They rescheduled for November 30, but Teague later cancelled that meeting as well. Tr. 22:2-7 (Torrente).[4]

On December 12, 2018, Sutton reappeared to state that he was busy moving into his new house and would not be able to meet until after December 17. Tr. 22:20-24 (Torrente). The parties thereafter agreed to meet on January 10 and 11, 2019. GC ex. 5.

When bargaining began, the Respondent refused to provide necessary information.

When the parties met for negotiations on January 10, 2019, the Charging Party's need for information from the employer became apparent immediately. This was because the Respondent demanded a complete agreement from the Union and did not want to put an agreement together

[2] Sutton's testimony is that Torrente did not take him up on this offer to provide a substitute. Tr. 66: 13-18 (Sutton). However, this claim is clearly contradicted by GC ex. 16 and that fact that James Teague reached out to Torrente soon after the exchange.

[3] Around this time, Virelli, having not heard from Sutton, sent another certified letter, this time directly to the Respondent, requesting information and demanding bargaining. It was received by the Respondent. GC ex. 13.

[4] Teague denies speaking with Torrente regarding scheduling dates for bargaining, but admits to having "some communication" with Torrente during this time. Tr. 103:1-6 (Teague).

piecemeal. Tr. 24:3-8 (Torrente), 57:19-58:2 (Virelli), 67:1-13 (Sutton). So the Respondent was essentially demanding a benefits proposal on day one of bargaining.[5]

As bargaining progressed, the need for certain information, specifically benefits costing information, became more and more necessary. As Torrente testified, "In order to cost the agreement, to figure out, you know, our proposals and put a whole contract together, it's important for us to know what we have to work with. Therefore, it was very important for us to know the cost of the benefit package and what the benefit package entailed." Tr. 23:23-24:2 (Torrente). As Virelli testified, the Charging Party needed the information "So we could make reasonable proposals to present to the Company." Tr. 49:7-9 (Virelli).

In April 2019, Virelli sent a written, comprehensive benefits request to Sutton. Tr. 24:9-17 (Torrente).[6] When Sutton was subsequently replaced as the Respondent negotiation by Christopher McHale ("McHale"), Torrente resubmitted the request in July in 2019. Tr. 24:18-25:1 (Torrente). The Charging Party did not receive a complete response to either.[7]

Sutton responded to the Charging Party's information request by largely denying it. He provided some information, but also wrote throughout his response, "Cost information will not

[5] It is worth noting that, while Sutton testified that he wanted a full contract proposal at the first and second meeting in January and February, he did not communicate this demand to the Union prior to the January session. Tr. 77:17-19 (Sutton). He otherwise admitted that the parties did bargain during those two sessions and that the union came with proposals to each. Tr. 77:10-16, 78:11-14 (Sutton), 106:17-23 (Torrente). The Respondent also admitted to providing no proposals to the Charging Party during those two sessions. Tr. 89:19-90:1 (Allen).

[6] Her previous, unanswered requests also contained requests for benefit information. Tr. 48:16-20 (Virelli).

[7] Although the record is not entirely clear, it appears that there was an agreement between the parties, around this time, to meet for only two days per month, at eight hours each day. Tr. 82: 4-6 (Allen).

be shared." GC ex. 10. The same day, Torrente responded by emailing Sutton, stating that the Respondent's response was "not sufficient" and restating the need for the benefits costing information. GC ex. 6. Sutton responded again stating, "I have reviewed the requested information, but will not be providing same. I have stated previously there is a limit to the information we will be providing, and in this you ask for more than we will share. In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan." Id.[8] Sutton's testimony confirmed the same: "They wanted to know our specific cost structure and exactly what we were paying for benefits, and we weren't going to provide that." Tr. 74:23-25.

When the same request was resubmitted to McHale, the Charging Party received the same response. There was some initial back and forth about what was already provided. GC exs. 7-9. However, on July 25, 2019, McHale ultimately resent Sutton's earlier response, and stated, "It is the company's position that all of the information that the union is entitled to has been disclosed." GC ex. 10.[9]

[8] Disappointingly, Sutton's testimony compares collective bargaining to "going to a car dealership." Tr. 75:1-6 (Sutton). Such a simile, that collective bargaining is like commission based retail sales, is not only inapt, but reveals the Respondent bad faith attitude towards the whole process, especially as it applies to the duty to provide information that is necessary and relevant to bargaining.

[9] The Respondent provided *some* information to the Union. It provided a 2018 benefits SPD (R ex. 1), which is a summary of benefits but does not provide employer costing information. In 2019, the Charging Party requested an updated SPD for the new benefit year, but the Respondent only responded that benefits had not changed. The Respondent refused to provide any documentation to that effect. Tr. 31:7-22 (Torrente). The Respondent also provided a Health Insurance Option Form (R ex. 2) and a list of selections by employees (R ex. 3), but, again, those documents had some information regarding *employee* cost, but not *employer* cost. The Union made it clear throughout that it needed that employer costing information. Tr. 30:17-31:4, 39:19-22 (Torrente) 59-:4-12 (Virelli).

Despite the Respondent's attitude toward bargaining, much progress towards a contract was made. The parties had tentatively agreed to 35 items. Tr. 35:5-7 (Torrente). The only items that were left remaining until a full "TA" could be reached were wages, profit sharing, signing bonuses, and, of course, insurance benefits. Tr. 34:24-35:4 (Torrente). As Virelli put it, "We were, I would say, 99 percent done with that contract and hoped to wrap it up within the two scheduled days that we had. So, we were pretty much done. We had done everything else but the economics, pretty much." Tr. 54:6-11 (Virelli).

The Respondent withdrew recognition and refused to bargain despite the previous unremedied ULPs.

The parties had a bargaining session scheduled for November 25, 2019. Instead of bargaining on that day, McHale hand delivered a letter to the Charging Party's negotiation team stating that they had received a petition signed by a majority of employees stating that they do not wish to be represented by the UAW. GC ex 15. The letter stated that the Respondent was withdrawing recognition from the Union. Id. The Charging Party demanded that, in light of the unremedied ULPs, the Respondent rescind its decision and commence bargaining. The Respondent refused and no further bargaining was conducted. GC ex. 11.

The ALJ's Decision

The ALJ found that the Respondent unreasonably delayed meeting with the Charging Party for a period of almost 3 months at the start of the certification year, the Respondent's "busy negotiator" defense fails as a matter of law and, even if that were not the case, that defense would fail under the facts here because the Respondent did not exert the requisite effort to meet at reasonable times as required by the Act. Decision at 14. The ALJ also found that The Respondent violated the Act when it stated that it would not consider any proposal on union-administered benefits (Decision at 14) , and then refused to provide the Charging Party with

multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees. Decision at 16. In light of these multiple, unremedied unfair labor practices, the ALJ found that the disaffection petition was tainted and that the Respondent could, therefore, not lawfully rely on it. Decision at 19.

The Respondent filed exceptions and an accompanying brief to which the Charging Party now responds.

III. THE EMPLOYER'S EXCEPTIONS

The Respondent filed four exceptions to the ALJ's decision. The arguments contained in the Respondent's brief are legally and factually without merit. The exceptions are as follows:

1. To the ALJ's finding that "Respondent failed to bargain in good faith and violated Section 8(a)(5) and (1) of the Act during the period from October 15, 2018 to January 9, 2019."

2. To the ALJ's finding that "Respondent violated Section 8(a)(5) and (1) of the Act since April 10, 2019, when it stated that it would not consider any proposal on union-administered benefits."

3. To the ALJ's finding that "Respondent violated Section 8(a)(5) and (1) of the Act since April 17 and July 9, 2019, when it refused to provide the Union with multiple types of requested cost information regarding the existing benefit plans for bargaining unit employees."

4. To the ALJ's finding that the "Disaffection petition was tainted by the Respondent's multiple, unremedied unfair labor practices and thus Respondent could not lawfully rely on that petition to withdraw recognition and violated Section 8(a)(5) and (1) by doing so."

IV. THE UNION'S RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT

Respondent's exceptions are without merit. The arguments below show that Respondent's exceptions and supporting brief should be rejected by the Board, and the decision of the ALJ should be affirmed.

A. The ALJ correctly found that Respondent violated the Act by failing and refusing to meet at reasonable times and confer in good faith from October 15, 2018, to January 9, 2019.

Respondent's exception relies mainly on two assertions: one is that it only cancelled one bargaining session, the other is that it offered to bargain in December 2018 (even though the parties did not meet until January).

To support its position that its did not violate the Act because it only cancelled one bargaining session, Respondent relies on the ALJ decision Bhc Nw. Psychiatric Hosp., LLC d/b/a Brooke Glen Behavioral Hosp., 2016 WL 5845860 (Oct. 5, 2016). In that case, the respondent cancelled one bargaining session because it objected to the attendance of "observers" who the charging party brought with them to the session. The ALJ found that the single cancellation did not amount to a violation because the parties resolved the issue, met the next day, and continued to bargain, free of other unfair labor practices.

In the present case, it is agreed that the November 5-7 bargaining sessions were cancelled, at the last minute, by the Respondent. It is contested whether there were additional incidents of Respondent cancelling bargaining sessions in November and December, but it is clear that the facts here are not like those in Bhc Nw. Psychiatric Hosp. The parties did not cure the refusal to bargain the next day. Instead, it took the Charging Party three months to get the Respondent to come to the bargaining table. When the parties did meet, bargaining was not free

from other violations because the Respondent continued to violate the Act until its illegal withdrawal of recognition.

Respondent also relies on Dilene Answering Serv., 257 NLRB 284 (1981). However, Respondent mischaracterizes the holding there. In that case, the ALJ found a violation based on a single instance of an employer cancelling a bargaining session because it objected to the attendance of several unit employees at a bargaining session. The Board upheld that ruling, but reversed the ALJ on other issues which had the effect of adding more violations to the order.

Here, Respondent uses the quote from Bhc which cited to Dilene: "Thus, the Board's refusal to bargain finding in Dilene Answering Service was not based solely on a single cancellation of a bargaining session; it also included findings that the employer unilaterally implemented a wage increase and engaged in 'ritualistic pro forma bargaining.'" Bhc at n. 12. Respondent appears to suggest that this quote stands for the proposition that a single incident of cancellation *cannot* support a violation for refusal to bargain. This is not the case. This quote only refers to the fact that the Board accepted the ALJ's finding of a violation, and then tacked more violations on top of that.

Respondent also relies on Int'l Powder Metallurgy Co., Inc., 134 NLRB 1605 (1961) and Meyer's Bakeries, Inc. & S. Bakeries, 2006 WL 1358752 (May 12, 2006) for the proposition that single cancellations are *de minimus* and therefore cannot constitute a violation of the Act. In Int'l Powder Metallurgy Co., the employer initially refused to bargain, but then quickly remedied its refusal. The Board agreed with the ALJ that the instances were quickly corrected by the employer and had no permanent impact on bargaining. Similarly, in Meyer's the ALJ found that the employer cancelled one bargaining session, but did not find a violation because the parties met before and after that cancellation, there was no evidence of any other dilatory tactics or

attempts to delay bargaining, and the cancellation did not significantly preclude effective bargaining.

The present case is unlike Int'l Powder Metallurgy Co. and Meyer's. In this case, the "single" cancellation was for the initial bargaining session, and it initiated a three-month delay in bargaining. Once bargaining commenced, the employer continued to violate the Act at the bargaining table. Therefore, it cannot be said, even if it is accepted that there was only one cancellation, that it had no permanent impact on bargaining or that the Respondent cured its refusal and then bargained in good faith.

Respondent also claims it is absolved of a violation because there is "written evidence" that it offered to meet in December. Respondent does not cite to any exhibit, but rather to the testimony of Torrente, who said, "We received communication from Jonathan Sutton on December 12th, stating that he was busy moving into his new house and he would not be available until after December 17th. And at that point in time, we rescheduled for January 10th, 2019." Tr. 22: 18-24. Respondent also cites Sutton's testimony:

> Q. Why were there no sessions scheduled for December 2018?
>
> A. Well, I had a multi-million-dollar property in Houston that I sold, and so I was unable to be there. I sent them an email letting them know that that was the case, and if they wanted me to have someone else substitute in, that I would make arrangements for as much.
>
> Q. Okay. And did they ask you to substitute someone?
>
> A. No, sir, they did not. We agreed in December, there was communiqué back and forth through email and telephones, that we'd simply start up in January. December is a very difficult month to meet, anyway, with holidays and travel and whatnot.

First, Sutton's testimony that the Charging Party did not request a replacement negotiator is clearly contradicted by documentary evidence.[10] GC ex. 16. Second, the testimony cited by the Respondent does not show that it performed its duty to bargain on any date prior to January 9, 2019, nor does it attribute any delay to the Charging Party. The ALJ's Decision addressed this point. After discussing the Union's numerous attempts to schedule bargaining in October and November 2018, which were unsuccessful because of Respondents' actions, the ALJ held, "It is clear under these facts that, during the 3 months following certification, the Respondent failed to meet its obligation to make 'expeditious and prompt arrangements' to meet and confer with the degree of diligence it would accord to other business matters of importance." Decision at 13 (internal citations omitted).

It is also worth noting that Respondent attempts to refer to a bargaining session in May 2019, where the Charging Party walked out of bargaining and did not return the same day, to support a proposition that, since the Charging Party also cancelled one session, the Respondent should not be charged with a violation for cancelling another. It should be noted that the ALJ already addressed this allegation by referring it to a "mischaracterization of the evidence." Decision at 9, n. 10. Also, the Respondent's and the Charging Party's actions are not equal as Respond would have the Board believe. As noted above, Respondent's cancellation resulted in a three-month delay, and frustrated the bargaining process. Charging Party's actions resulted in no significant delay (since the parties met the next day Tr. 76:9-12 (Sutton).) and there are no other pending ULPs against the Charging Party in this matter (Tr. 105:17-21 (Torrente)), so it cannot be said that the Charging Party was attempting to otherwise frustrate the bargaining process.

[10] It is also worth noting that the ALJ found, "Based on Sutton's testimony, demeanor, and the record as a whole I find that he was an unusually biased and unreliable witness regarding disputed matters." Decision at 4, n. 4.

Therefore, even if this May 2019 incident were significant, which it is not, the *Charging Party*, is much more like the respondents in Int'l Powder Metallurgy Co. and Meyer's, than the Respondent in this case.

For these reasons, Respondent has not shown why the Board should accept its exceptions, and the Decision should be affirmed.

B. The ALJ correctly found that Respondent violated the Act by stating that it would not consider any proposal for a union-administered benefits plan.

In response to a written information request regarding benefit costing information, Sutton wrote, "I have reviewed the requested information, but will not be providing same. I have stated previously there is a limit to the information we will be providing, and in this you ask for more than we will share. In light of as much, there seems no need for you to put further effort into working up a proposal for union provided benefits. We will stick with the present plan." GC ex. 6. The ALJ found this statement to be a violation of the Act because it is a refusal to bargain over a mandatory subject of bargaining. Decision at 14. Respondent now files exceptions claiming a violation did not occur because, even though it admits to making the statement, it was an isolated incident which did not otherwise affect bargaining. Respondent's argument is factually and legally inaccurate.

Respondent takes issue with the ALJ's reliance on E.I. Dupont De Nemours & Co. & Ampthill Rayon Workers, Inc., 304 NLRB 792 (1991). Respondent seizes upon language in footnote 1 of that case stating that the Board found a violation because of an employer's "adamant" refusal to discuss a mandatory subject of bargaining "throughout the entire course of negotiations." Respondent argues that since its statement was only made one time and "not supported by any future actions of the Respondent," a violation did not occur.

However, Respondent does not, and cannot, describe any meaningful bargaining on benefits after it made the statement in question. It cites to two points in the record, neither of which describe bargaining. It cites to Tr. 57: 17-20. This is the testimony of Virelli responding to the question of "when did the topic of insurance benefits come up?" to which she responds, "When we started negotiating, actually talking about benefits, it was after my request in April." She is not describing bargaining. She is describing when the "topic came up" in the context of her requesting information and the employer denying that request.

Similarly, Respondent cites 75:7-17 which is Sutton testifying as to why he denied the info request (which is another violation as determined by the ALJ), but offering to "look at whatever you want to put forward." Indeed, Respondent's brief characterizes their actions as "not preventing or ignoring" any of the Charging Party's proposals. Of course, merely *listening* to the other side does not amount to good faith bargaining, which requires the parties to meet *and* confer. This mere listening, coupled with the Respondent's refusal to provide necessary and relevant information to the Charging Party, means that Respondent *did* take action to support its initial statement that it would refuse to bargain over healthcare. Therefore, it *has* shown a pattern of refusal throughout the course of bargaining and E.I. Dupont De Nemours applies.

For these reasons, Respondent has not shown why the Board should accept its exceptions, and the Decision should be affirmed.

C. The ALJ correctly found that Respondent violated the Act by refusing to provide the Charging Party with requested cost information regarding the existing benefit plans.

The ALJ found that the Respondent violated the act by refusing to provide certain benefit costing information to the Charging Party. The ALJ correctly noted that the information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively

relevant" and that Respondent did nothing to rebut that presumption or provide any other substantive basis for withholding the information. Decision at 15-16. The ALJ further provided cites to numerous cases affirming that information regarding the costs of employee benefit plans, including the employer's costs, is relevant to bargaining. Decision at 16.

Respondent now files exceptions to this holding. It first takes exception to the ALJ's holding that the requested information was presumptively relevant. To support its position, it cites In Re W. Penn Power Co., 339 NLRB 585, 587 (2003): " Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule." (quoting Good Life Beverage Co., 312 NLRB 1060, 1062 fn.9 (1993)). Respondent takes this quote out of context. W. Penn Power and Good Life Beverage were both evaluating the *timeliness* of an employer's response to an information request, not whether the request was relevant or not. Indeed, the next sentence reads, "What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow."

Respondent also argues that it provided *some* of the information requested and the Charging Party could have used that information to prepare a proposal, so Charging Party cannot establish that it *needs* the costing information. As the Respondent argued, "The ALJ failed to take into consideration as to whether the information was needed to perform the statutory obligation of the Charging Party." This is blatantly incorrect. The ALJ ruled, "Even if the cost information for unit employees' benefits was not presumptively relevant, and even if the Board had not repeatedly recognized the relevance of exactly this type of information, I would find that such information was clearly relevant in this case because I credit Torrente's testimony that Local 228 needed the information to 'cost the agreement, to figure out . . . our proposals and put a whole contract together.'" Decision at 16.

For these reasons, Respondent has not shown why the Board should accept its exceptions, and the Decision should be affirmed.

D. The ALJ Correctly found that the Respondent violated the Act by withdrawing recognition from the Charging Party.

Respondent argues that the Board's decision in Johnson Control Inc., 368 NLRB No. 20 (2019) permitted it to withdraw recognition when it did. The ALJ provided a detailed response to this argument (Decision at 18, n. 16), but Respondent reasserts it in the form of an exception. The ALJ stated that Johnson Controls was not directly on point and that Master Slack, 271 NLRB 78 (1984) provides a more appropriate analysis. Respondent's brief does nothing to refute this point.

Respondent argues that Johnson Controls holds that "the employer must have a good faith belief that the union no longer enjoys the majority support of the bargaining unit, and that there be no outstanding unfair labor practices that were the direct cause of the union losing majority support." This is an incorrect statement of the holding in Johnson Controls. That case did not involve allegations that the disaffection petition was tainted by unfair labor practices. 368 NLRB No. 20, slip op. at 18 (as noted by the ALJ in that case). In fact, the only reference to taint when the Board was announcing its standard was, if a union wants to challenge an employer's withdrawal of recognition, it may file an unfair labor practice alleging that the disaffection petition is tainted by "serious unremedied unfair labor practices." 368 NLRB No. 20, slip op. at 9. For this proposition, the Board cited, In Re Mesker Door, Inc., 357 NLRB 591, 596 (2011) which is a case that was decided under the Master Slack framework (and subsequently overruled on other grounds).

In the present case, the Charging Party has done exactly what Johnson Controls suggests – it filed an unfair labor practice alleging that the disaffection petition was tainted by serious

unfair labor practices. The ALJ has also done what Johnson Controls suggests – he evaluated the Charging Party's claim under a Master Slack framework. Despite its incorrect statement on what Johnson Controls actually holds, Respondent provides no basis for its exception to this issue.

Respondent also argues that Conair Corp. v. N.L.R.B., 721 F.2d 1355 (D.C. Cir. 1983) prohibits a bargaining order in this case because it hold, "Congress has not empowered the Board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation." 721 F.2d at 1360. That case, however, was dealing with situations where a majority was *never* established by any means. In the present case, the Charging Party was certified as the representative of the bargaining unit. GC ex. 2. Therefore, Conair is inapplicable. It is well established that the Board has the authority to issue a bargaining order in the present case as the Board has continued to apply Mar-Jac Poultry, 136 NLRB 785 (1962) even in light of the D.C. Circuit's holding in Conair.

For these reasons, Respondent has not shown why the Board should accept its exceptions, and the Decision should be affirmed.

V. CONCLUSION

Having shown that the Respondent's exceptions to be meritless, the Union respectfully requests that the Board reject the exceptions and affirm the Administrative Law Judge's decision.

Respectfully Submitted,

LOCAL 228, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

By: _____/s/ Stuart Shoup_____
Stuart Shoup
Associate General Counsel
International Union, UAW
8000 E. Jefferson Ave.
Detroit, MI 48214
(313) 926-5216
sshoup@uaw.net

Dated: November 6, 2020

CERTIFICATE OF SERVICE

I, Stuart Shoup, hereby certify that I caused a true and correct copy of the foregoing Response to Respondent's Exceptions and Supporting Brief to be e-filed with the NLRB, and served via email on the following parties on the date below:

Kelly Temple
National Labor Relations Board, Region 7
477 Michigan Avenue
Detroit, MI 48226-2569
kelly.temple@nlrb.gov

Christopher McHale
47350 Westwood Place
Potomac Falls, VA 20165
mchale2052@gmail.com

Dated this 6th day of November, 2020

__/s/ Stuart Shoup_____
Stuart Shoup